Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **359/ 2013**
Datum verhoor/Date heard: **17 / 04 /2015**
Datum gelewer/Date delivered: **29 / 05 /2015**

In the matter between:

CHANGING TIDES (PTY) LTD Applicant

and

FERDINAND ALI DANSTER First Respondent

GERTRUDE TRUDY DANSTER Second Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

BACKGROUND

[1] Action was instituted during March 2013. On 24 October 2013 the Registrar of this court granted default judgment

against the respondents and in favour of the applicant for payment of the amount of R243,189.18, plus interest and costs.

[2] On 2 July 2014 the applicant lodged this application to have the property, described as Erf 22656, situated in the Sol Plaatje Municipality and also known as 28 Owl Crescent, Kimberley (hereinafter referred to as 'the property'), declared specially executable and further that the Registrar be authorized to issue a writ of execution to give effect to such order and the respondents be ordered to pay the costs on a scale as between attorney and own client. This application was to be made on 1 August 2014. The respondents gave notice of their intention to oppose this application on 29 July 2014 and the matter did not proceed on 1 August 2014.

[3] As no opposing papers were filed on behalf of the respondents, the application was enrolled to be heard on 5 December 2014. On 2 December 2014 the respondents filed and served the opposing affidavit, accompanied by an application for condonation of the late filing of the opposing affidavit. The applicant opposed the application for condonation and the matter was postponed to the opposed roll, to be heard on 17 April 2015. The applicant proceeded to file replying papers on 26 February 2015.

[4] At the hearing of the application, on 17 April 2015, the applicant abandoned its opposition to the application for condonation. The parties indicated that argument would be directed at the merits of the main application in respect of the relief as set out in paragraph [2] *supra.*

THE LEGAL POSITION

[5] The legal position in respect of applications to have immovable property declared specially executable has been spelt out in numerous decisions and more specifically in **GUNDWANA v STEKO DEVELOPMENT AND OTHERS**.[1] A court has to consider all relevant circumstances before ordering execution against the property if such property is the judgment debtor's primary residence.[2]

[6] The Constitutional Court has provided guidance and set out examples of such 'relevant circumstances' in **JAFTHA v SCHOEMAN & OTHERS**; **VAN ROOYEN v STOLTZ AND OTHERS***.*[3]

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[1] 2011 (3) SA 608 (CC)

[2] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 330C–D; *Jaftha v Schoeman & Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at 161I

[3] *Jaftha v Schoeman & Others supra* at 161I–163B; See also *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W)*; Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) at 277C–F; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 332C–333D; *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) at 567A–568A

[7] Execution shall not issue against immovable property until the movable property has been excussed.[4] It should further be taken into account that execution may not be avoided if there are no other proportionate means to attain the same end.[5]

[8] It is against the background of these principles that the facts of this matter should be considered.

THE FACTS

[9] The respondents did not challenge the correctness of the default judgment or seek the judgment to be rescinded and, in my view, rightly so. The facts, as alleged by the applicant in support of the application to have the immovable property declared executable, appear mostly to be common cause between the parties.

[10] The claim of the applicant was based on the breach of a loan agreement, entered into with the respondents during 2008, in that the respondents failed to regularly pay the instalments. The only security of the applicant for the loan granted to the respondents is the mortgage bond registered over the property in favour of the applicant. The respondents, in order to secure the loan, mortgaged the

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[4] *Barclays Nasionale Bank Bpk v Badenhorst* 1973 (1) SA 333 (N); *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 116B-117A

[5] *Gundwana v Steko Development and Others supra* at 626F–G par [54]

property in favour of the applicant with the full knowledge that the applicant would be entitled to rely on its security and seek an order to have the property declared specially executable and ultimately sell it in execution.

[11] The applicant has, as far back as 2011, endeavoured to make contact with the respondents in an effort to obtain payment of the arrears. The respondents applied for debt review during July 2011. This application was withdrawn in September 2011. On 25 July 2012 the applicant agreed to capitalize the arrears in an effort to assist the respondent in bringing their loan account up to date. Despite these efforts, the account of the respondents has been in arrears since November 2012. Despite several undertakings and arrangements by the respondents, the arrears escalated dramatically from April 2013.

[12] Even after the matter was handed over to the applicant's attorney for legal action, the applicant continued its efforts to try and collect the arrears and make alternative arrangements, once again without success. The applicant went as far as to suggest that the respondents sell the property privately, but they refused to do so. The respondents continued to make erratic payments.

[13] After default judgment was granted, the applicant attempted to execute against the movable property of the

respondents on 7 February 2014. *Nulla bona* returns were received from the Sheriff. As at 18 June 2014, shortly before this application was launched, the total indebtedness of the respondents amounted to R264,815.90 and the arrear instalments amounted to R36,027.96, such arrears representing more than eleven monthly instalments.

[14] The respondents are not receiving a state subsidy in respect of the loan. The property is used for residential purposes and is occupied by the respondents as their primary residence.

[15] The facts pertaining to other persons occupying the property with the respondents were unknown to the applicant. The respondents (then defendants) were, in the Particulars of Claim, informed about the provisions of section 26(1) of the Constitution of the Republic of South Africa and that such right might be implicated by an order for execution. They were invited to supply information supporting any alleged infringement on their right of access to adequate housing before the court and that failure to do so might result in such an order being made.

[16] In his opposing affidavit dated 2 December 2014, the first respondent averred that he has experienced great financial difficulty for the past three years, as he has been struggling to source work as a building contractor. His total income

for the six months preceding this period is alleged to have been R17,500.00.

[17] The first respondent further stated that he had been approached telephonically by an employee of the applicant, who enquired how he intended settling his obligations towards the applicant. From the timeframe of the events, this conversation appears to have taken place during the beginning of November 2014. During this telephonic discussion, the first respondent undertook to make monthly instalments of R2,500.00 per month, the first payment of which was due on 7 December 2014.

[18] This agreement, according to the first respondent, was accepted by the applicant. The First Respondent averred that it was agreed that, if the payment is made, the application to declare the property executable will not be proceeded with. As proof of this alleged agreement, the first respondent attached copies of e-mail correspondence and a letter, dated 1 December 2014, from his attorneys of record to the applicant's attorneys. In this letter the first respondent's attorney stated that it is their instructions that the first respondent has made arrangements with an employee of the applicant to the effect that the application to have the property declared executable would not be proceeded with, provided that monthly payments of R2,500.00 are made and the first of such payments to be

made on or before 7 December 2014. The applicant's attorneys were requested to advise whether the matter was proceeding. The applicant's attorneys appear not to have responded to this letter, but proceeded on 2 December 2014 to enrol the application to be heard on 5 December 2014.

[19] The first respondent, in his opposing affidavit, confirms that he is in a position to pay the sum of R2,500.00 per month and that he made payment thereof into the loan account on 2 December 2014. He submitted that the application could not be proceeded with in the light of the agreement referred to above. The respondents however have not made any further payments thereafter.

[20] The first respondent further averred that, when the Sheriff served the warrant of execution on him, he informed him that he had no money to pay the judgment debt, but that he had a vehicle on the premises valued at approximately R35,000.00 and that he was prepared to sell this vehicle in lieu of his indebtedness. He denies that the Sheriff searched inside his home. He stated further that his household furniture is worth approximately R150,000.00. He submitted that he thus has a substantial amount to cover the indebtedness of the respondents and that there is no need to execute the immovable property.

[21] The only other facts disclosed in respect of the personal circumstances of the respondents are that they, together with their two children, aged 18 and 11 years and two grandchildren, aged 9 and 5 years, reside on the property sought to be declared executable. The first respondent is a building contractor and second respondent is a housewife.

[22] The second respondent filed neither an opposing nor a confirmatory affidavit.

[23] The applicant, in the replying affidavit dated 20 February 2015, denied that any agreement was reached, as alleged by the first respondent. It was reiterated that all attempts to settle the dispute were made by the applicant. In support of its denial of the agreement, the applicant attached a copy of an extract of its official workflow system in this matter, compiled and confirmed by Priscilla Hoosen.

[24] The interaction between the said Priscilla Hoosen and the first respondent, as set out in the workflow system document, appear to have been as follows:

24.1 The first respondent indicated on 14 May 2014 that he would be able to pay R2,500.00 at the end of the month after completion of his contract, but that he had still not secured permanent employment. He was informed that the amount of R2,500.00 was too little and that the applicant was proceeding to attach the property.

24.2 On 4 September 2014 the first respondent promised to pay R2,500.00 on the following Saturday.

24.3 On 16 October 2014 the first respondent was informed via 'SMS' that the applicant was proceeding with steps to attach the property to be sold at an auction.

24.4 On 10 November 2014 the first respondent was reminded of his earlier promise. He undertook to pay R2,000.00 on the Monday, as he had started working at a church. He could not tell Hoosen when he would be able to start addressing the arrears and maintain the instalment. On this day the first respondent was advised that legal action was proceeding and that he should consider selling the house, to which he responded that he would call Hoosen by the Monday subsequent to having made the payment.

[25] The amount of R2,500.00, paid on 2 December 2014, was the first payment that the applicant received in seven months and no further payments have been received since. This is confirmed by the updated payment history attached to the replying affidavit.

[26] The applicant denies the first respondent's allegations pertaining to the availability of movable assets to satisfy the debt. In the returns of the Sheriff, in respect of both respondents, the Sheriff specifically states that the respondents informed him that they had '*no money, disposable property or assets*' to satisfy the warrant or any portion thereof. The Sheriff also stated that no movable property/disposable assets were either pointed out or could be found after a diligent search and enquiry at the given address and therefore that his return is one of *nulla bona.*

[27] It was submitted on behalf of the applicant that a proper case had been made out for the relief sought and that the first respondent's opposition of the application is merely a delaying tactic.

[28] It was submitted on behalf of the respondents that the application should be dismissed, alternatively that it should be referred for oral evidence as a result of the first respondent's alleged agreement with the representative of the applicant to make payments of R2,500.00 and the applicant's undertaking that the sale in execution of the property would not be proceeded with. The first respondent only made one payment as the applicant has continued with the application to have the property declared executable.

[29] It was further submitted that it would not be just to declare the property executable under the circumstances. The applicant has not exhausted all its remedies, as the respondents have movables which, if sold, could result in a substantial amount of the indebtedness being extinguished.

[30] It is trite law that an applicant who seeks final relief in motion proceedings must, where a dispute of fact arises, accept the version set up by the respondent unless the respondent's allegations are such that they do not raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting those allegations merely on the papers.[6]

[31] I have no hesitation in rejecting the first respondent's version that an agreement had been reached between himself and Priscilla Hoosen during November 2014. These allegations are contradicted by the contents of the workflow system document, as confirmed by Hoosen. It is also highly improbable that the applicant would have accepted such an offer, given the amount of the arrears and the history of this matter. It is also improbable that the applicant then would have proceeded to enrol the application if the first respondent had effected payment in accordance with the agreement on 2 December 2014.

[6] *Wightman t/a JW Construction V Headfour (Pty) Ltd* 2008(3) SA 371 at 375 par [12]; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634E-635C

[32] I deal secondly with issues raised in respect of the *nulla bona* returns, issued by the sheriff of this court. In terms of section 43(2) of the Superior Courts Act[7], the return of the sheriff or a deputy sheriff about what has been done upon any process of a court, shall be *prima facie* evidence of the matters therein stated. An impeachment of the return will not be lightly upheld and the clearest evidence must be adduced in contradiction and/or rebuttal of such evidence.[8]

[33] The allegations in respect of the availability of movable property that can be sold in execution are bald allegations, not substantiated by facts and/or proper valuations of the property. These allegations are also not confirmed by the second respondent, who was present when the Sheriff attempted to execute against the movable property of the respondents. The respondents have not rebutted the *prima facie* proof and I accept the *nulla bona* returns as correct and as proof of what is stated therein.

[34] Even if the first respondent's version is accepted, the total value of the movables, at best, amount to R185,000.00. In the event that such amount is raised at an auction, it still is clearly insufficient to satisfy the writ and/or extinguish the debt. Given the dire financial position the respondents find

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[8] *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96F-G;

themselves in and the payment history, I am of the view that the respondents will not be in a position to settle their debt towards the applicant.

[35] The respondents have failed to place sufficient relevant circumstances before the court warranting the exercise of my discretion in their favour. Taking into account the history of this matter, the substantial amount of the judgment debt and the respondents' inability to pay the instalment and arrears, the only realistic manner in which the applicant can protect its interests is by means of the relief sought herein. In my view there are no other proportionate means to attain the same result and therefore execution cannot be avoided.

[36] In respect of the costs, it was submitted on behalf of the respondents that there was no need for the applicant to approach the High Court in this instance and that the respondents should not be ordered to pay the costs on the High Court scale, let alone on a scale as between attorney and own client. The respondents, in the loan agreement, consented and submitted to the jurisdiction of the Magistrate's court in respect of all proceedings connected with this agreement, notwithstanding the amount claimed or the value of the matter in dispute exceeding such jurisdiction. This however did not preclude the applicant from having instituted proceedings in the High Court. The

loan agreement further provides for legal costs to be paid on a scale as between attorney and own client. The amount claimed was substantial. Despite the summons having been served on the respondents in person, they elected not to defend the action. Default judgment was granted by the registrar of this court, hence the application to have the property declared executable was lodged in this court. It was not unreasonable of the applicant to litigate in this court. On the other hand, the respondents were invited and entitled to place information before the court why this order should not be granted. Even though they were unsuccessful in opposing the application, there is no reason why they should be punished for doing so by way of a cost order on attorney and own client scale.

WHEREFORE I MAKE THE FOLLOWING ORDER:

1. **THE PROPERTY DESCRIBED AS ERF 22656, SITUATED IN THE SOL PLAATJE MUNICIPALITY AND ALSO KNOWN AS 28 OWL CRESCENT, KIMBERLEY IS DECLARED SPECIALLY EXECUTABLE;**

2. **THE REGISTRAR IS AUTHORIZED TO ISSUE A WRIT OF EXECUTION TO GIVE EFFECT TO SUCH ORDER;**

3. **THE RESPONDENTS ARE ORDERED, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE**

ABSOLVED, TO PAY THE COSTS OF THE APPLICATION ON A SCALE AS BETWEEN PARTY AND PARTY.

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SL ERASMUS
ACTING JUDGE

For the Applicant:	Adv. A.D. Olivier (oio Haarhoffs Inc)
For the Respondent:	Mr. S.J. Groenewaldt (oio Towell & Groenewaldt Attorneys)